

Durham Research Online

Deposited in DRO:

10 July 2012

Version of attached file:

Published Version

Peer-review status of attached file:

Peer-reviewed

Citation for published item:

Bohlander, Michael (2012) "There is no compulsion in religion': Freedom of religion, responsibility to protect (R2P) and crimes against humanity at the example of the Islamic blasphemy laws of Pakistan.', *Journal of Islamic state practices in international law.*, 8 (1). pp. 36-66.

Further information on publisher's website:

<https://www.electronicpublications.org/catalogue.php?id=46>

Publisher's copyright statement:

Additional information:

Use policy

The full-text may be used and/or reproduced, and given to third parties in any format or medium, without prior permission or charge, for personal research or study, educational, or not-for-profit purposes provided that:

- a full bibliographic reference is made to the original source
- a [link](#) is made to the metadata record in DRO
- the full-text is not changed in any way

The full-text must not be sold in any format or medium without the formal permission of the copyright holders.

Please consult the [full DRO policy](#) for further details.

**‘THERE IS NO COMPULSION IN RELIGION’
FREEDOM OF RELIGION, RESPONSIBILITY TO PROTECT (R2P) AND
CRIMES AGAINST HUMANITY AT THE EXAMPLE OF THE ISLAMIC
BLASPHEMY LAWS OF PAKISTAN**

Michael Bohlander^{*}

Saladin: Those rings! – Don’t trifle with me! I should think that those religions which I named to you might be distinguished readily enough. Down to their clothing; down to food and drink!

Nathan: In all respects except their basic grounds. Are they not grounded all in history, or writ and handed down? But history must be accepted wholly upon faith. Not so? Well then, whose faith are we least like to doubt? Our people’s, surely? Those whose blood we share? The ones who from our childhood gave us proofs of love? Who never duped us, but when it was for our good to be deceived? How can I trust my fathers less than you trust yours? ... Can I demand that to your forebears you should give the lie that mine be not gainsaid? ... The same holds true of Christians. Am I right?

Saladin: By Allah, yes! The man is right. I must be still.¹

Gotthold Ephraim Lessing, *Nathan the Wise* – Parable of the Three Rings

1. Introduction

Freedom of religion is one of the fundamental liberties and human rights for the recognition of which many people had to suffer and die over the millennia. It is one of the cornerstones of the secular society: No-one must be forced to adhere to or to abjure a certain set of beliefs. Coupled with the freedom of religion and in a certain

^{*} Chair in Comparative and International Criminal Law, Durham Law School. – I would like to thank Caroline Fournet, Stefan Kirsch, Javaid Rehman, Berend Keulen, Mohamed Badar, Guenael Mettraux and Mohammad Hedayati-Kakhki for reading and commenting upon an earlier draft of this paper. All views expressed and any remaining errors are my own.

¹ Gotthold Ephraim Lessing, ‘Nathan the Wise’ in Peter Demetz (ed), *Gotthold Ephraim Lessing: Nathan the Wise, Minna von Barnhelm, and Other Plays and Writings* (Bayard Quincy Morgan tr, Continuum 1998) 231 – 235. Full text available online at <www.lessing-akademie.de/ringparabel/texte/englisch.pdf> accessed 28 May 2012.

manner its counterpart is the other cornerstone, the freedom of expression: Everyone can think and say anything about anything unless by so doing they violate the rights of the others or create an unacceptable disturbance of the public peace. Open and public discourse about topics that are vital to the body politic is indispensable in a pluralist, secular society. For this model of society to work, this implies by necessity that no-one has the right not to have his views challenged, even critically challenged, in any event as long as the criticism is one of substance and not purely intended to debase. A challenge to one's own view can thus by definition not be a violation of one's own legally protected position. I have tried to show in an earlier article focussing on the *fatwa* by Ayatollah Khomeini against the writer Salman Rushdie that in a modern, secular society which respects all faiths and ideologies equally, the only legitimate aim of blasphemy laws can be the prevention of a breach of the public peace². Neither an offence to the deity nor to the feelings of the believers is sufficient to warrant criminalisation. The previous blasphemy laws of England and Wales, which only protected Christian beliefs and did not require such a breach of the peace, were hardly ever prosecuted in practice; they were also problematic from the point of view of equal treatment of religions in a secular state. They were consequently abolished in the Criminal Justice and Immigration Act 2008. Moderate Muslims will show similar attitudes and more tolerance to the views of non-Muslims even if they oppose their own deeply held religious convictions. Indeed, the author has had sufficient experience of such tolerance in personal encounters with Muslim friends and colleagues to refrain from undue generalisations.

But there is the other, stricter, conservative and repressive side of Islam that would erase all tolerance and impose its narrow views on everyone, if necessary by force. Yet, truth be told, a similar stream of thought exists, for example, in the blinkered representatives of evangelical fundamentalist Christianity particularly in the United States, although it has to be said that the threat and use of violence is rarer there and if used, tends to be applied against objects rather than persons, even if some misguided American priest recently went as far as publicly burning copies of the Qur'an in the

² Michael Bohlander, 'Public Peace, Rational Discourse and the Law of Blasphemy' (1992) *Anglo-American Law Review*, 162.

full knowledge that the foreseeable backlash of the Muslim community abroad could cost innocent lives - as it then did. Much of this attitude has to do with the fact that although a majority of Americans, for example, confess to believe in God, most of them actually do no longer know even the most basic tenets of their own faith³. Similarly, up to 70% of modern Muslims particularly in Western Europe have become 'cultural Muslims, confining their observance to celebrating festivals and observing rites of passage. Of the observing 30 per cent, most were engaged in private piety and were not political Muslims.'⁴

If and when cultural Muslims become radicalised, one cannot expect that they acquire a deep understanding of their religion from one day to the next; in fact, the psychological process of radicalisation as well as the accompanying intense peer pressure will naturally prevent them from giving credence to more moderate opinions and lead them to denounce the moderates as having been corrupted away from the proper practice of Islam.⁵ An accusation of blasphemy is one of the instruments of choice of reacting to 'lapsed Muslims' and unbelievers; such fine distinctions made by the Qur'an as between the *ahl al-kitab*, the People of the Book encompassing Jews, Christians and according to some readings the Zoroastrians on the one hand, and the *mushrikun* or polytheists on the other, do no longer count for much in the radical circles. In the 'battle for interpretational supremacy' there are serious struggles going on in some fringe sections of Muslim society, with each splinter group trying to strip the other of proper Muslim-status, as Christian H Meier has pointed out:

The 21st century has often been associated with a religious Renaissance. In terms of Islam, however, it would be better to speak of a fractionalization. There are courageous reformers who wish to interpret religious sources not on a literal basis, but rather true to the spirit of the text. Then there are the grey-bearded conservatives who have on hand detailed instructions from historical sources on how to react to every situation in life. And then there are the hot-heads who prefer an activist interpretation of Islam and also enjoy criticizing other Muslims. They all have very particular ideas on what a Muslim should do, think, and, above all, reject. ...

³ See on this phenomenon Stephen Prothero, *Religious Literacy: What every American needs to know – and doesn't* (Harper One 2007).

⁴ Sami Zubaida, *Beyond Islam – A New Understanding of the Middle East* (IB Tauris 2011) 111.

⁵ See for a first-hand account of a British Muslim and his experiences in radical Islam in the UK Ed Husain, *The Islamist – Why I joined radical Islam in Britain, what I saw inside and why I left* (Penguin Books 2007).

The consequences, first and foremost, affect minority confessions and apostates. This is because the "true Islam" is primarily defended on the outskirts of the faith. The terrorist attacks on two mosques of the Ahmadiyya community in Lahore in May last year bear bloody testimony to the precarious status of the group, whose membership in the umma is contested by other groups. The Ahmadiyya community, founded in 1889, had its status as adherents to Islam officially renounced by the Pakistani government in 1974, thereby leaving its members more susceptible to attack.

In this sort of environment, rational dialogue has become very difficult and the atmosphere has become increasingly charged. Meier continues:

Now, there is even a term for groups that find their adherence to Islam called into question – takfir, from the Arabic word "takfir", meaning "to make into non-believers". The practice is not only limited to militant minority Islamic groups. Even scholars from the venerable Azhar Mosque in Cairo have made common cause with radicals when it has been a matter of putting troublesome thinkers in their place. ... The fact that downright "takfir" wars have broken out between certain radical splinter groups... has become but a scandalous footnote in this rather ominous development. As long as the fundamentalists continue to succeed in presenting their views as the exclusive interpretation of the faith without encountering any decisive opposition, then cohesion among the various Muslim confessions is endangered. Influential religious scholars, who could represent mainstream Islam, are often regarded as the mouthpieces of their government or somehow caught up in politics.⁶

Somehow it is difficult to believe that this is what the Prophet had in mind when he said

A Muslim is the brother of a Muslim. He neither oppresses him nor humiliates him nor looks down upon him. Piety is here - and he pointed to his chest three times. It is evil enough for a Muslim to hold his brother Muslim in contempt. All things of a Muslim are inviolable for another Muslim: his blood, his property and his honour.⁷

Muhammad thus echoed the command from the Qur'an in Sura 3:103 – 105:

⁶ See <<http://en.qantara.de/The-Battle-for-Interpretational-Supremacy/16035c144/index.html>> accessed 27 June 2011.

⁷ Hadith 35 of the Forty Hadith. See <<http://fortyhadith.iiu.edu.my/hadith35.htm>> accessed 28 May 2012.

Hold fast to God's rope altogether; do not split into factions. Remember God's favour to you: You were enemies and then he brought your hearts together and you became brothers by his grace; you were about to fall into a pit of fire and he saved you from it – in this way God makes his revelations clear to you so that you may be rightly guided. Be a community that calls for what is good, urges what is right, and forbids what is wrong: Those who do this are the successful ones. Do not be like those who, after they have been given clear revelation, split into factions and fall into disputes: A terrible punishment awaits such people.

The topic of blasphemy is one that occupies the public international debate among Muslims and non-Muslims to a large extent these days. However, the criticism of that practice from the human rights perspective is rarely if ever heeded by those factions that should, and the often violent reactions will make moderate Muslims and non-Muslims alike even more reluctant to address a bigger but so far somewhat hidden problem, namely that of the increasing potential relevance of international criminal law for the debate. This paper will try to raise awareness and open the discussion, which will be painful for both sides. Given the wide range of legal issues involved, from interpretation of Shari'ah concepts to the ambit of the category of crimes against humanity under international criminal law, the discussion can only scratch the surface and further in-depth research around individual aspects is needed.

2. A look at the Islamic foundations for a blasphemy offence

Before we proceed to the study of the relationship between the offence of blasphemy under Shari'ah to modern international theory under the principle of R2P, short for 'Responsibility to Protect', we shall take a brief glance at the alleged basis for the punishment of blasphemers. Somewhat counter-intuitively against the background of the widely reported stance of Muslims especially in Pakistan to blasphemy, the holy book of the Muslims states in Sura 2:256: 'There is no compulsion in religion.' This well-known verse is supplemented by a host of others that sound a similar theme, and it is expedient to list some of them here:

16:82 But if they turn away from you, (O Prophet remember that) your only duty is a clear delivery of the Message (entrusted to you).

6:107 Yet if God had so willed, they would not have ascribed Divinity to aught besides him; hence, We have not made you their keeper, nor are you (of your own choice) a guardian over them.

4:79, 80 Whosoever obeys the Messenger, he indeed obeys God. And for those who turn away, We have not sent you as a keeper.

17:53 And tell my servants that they should speak in a most kindly manner (unto those who do not share their beliefs). Verily, Satan is always ready to stir up discord between men; for verily, Satan is man's foe Hence, We have not sent you with power to determine their Faith.

21:107 to 109 We have not sent you except to be a mercy to all mankind: Declare, Verily, what is revealed to me is this, your God is the only One God, so is it not up to you to bow down to Him? But if they turn away then say, I have delivered the truth in a manner clear to one and all, and I know not whether the promised hour (of Judgment) is near or far.

88:21 And so, (O Prophet!) exhort them your task is only to exhort; you cannot compel them to believe.

36:16 Our Sustainer knows that we have indeed been sent unto you, but we are not bound to more than clearly deliver the Message entrusted to us.

39:41 Assuredly, We have sent down the Book to you in right form for the good of man. Whosoever guides himself by it does so to his own advantage, and whosoever turns away from it does so at his own loss. You certainly are not their keeper.

42:6, 48 And whosoever takes for patrons others besides God, over them does God keep a watch. Mark, you are not a keeper over them. But if they turn aside from you (do not get disheartened), for We have not sent you to be a keeper over them; your task is but to preach...

64:12 Obey God then and obey the Messenger, but if you turn away (no blame shall attach to our Messenger), for the duty of Our Messenger is just to deliver the message.

The Qur'an thus appears to say that it was not for Muhammad and by extrapolation it is not for the *ummah* to force Islam on people who do not accept it of their own free will. In this respect, corporate Islam has sinned through the ages much like corporate Christianity, not least by exploiting the ignorance, lack of education and the fear of the strange and unknown other in their less sophisticated adherents.

In a similar manner, the following statements have been ascribed to Muhammad by the *hadith* collections of Bukhari and Al-Mawardi:

Whoever hurts a non-Muslim citizen of a Muslim state hurts me, and he who hurts me annoys God. (Bukhari)

He who hurts a non-Muslim citizen of a Muslim state, I am his adversary, and I shall be his adversary on the Day of a Judgment. (Bukhari)

Beware on the Day of Judgment; I shall myself be complainant against him who wrongs a non-Muslim citizen of a Muslim state or lays on him a responsibility greater than he can bear or deprives him of anything that belongs to him. (Al-Mawardi)

Anyone who kills a non-Muslim who had become our ally will not smell the fragrance of Paradise. (Bukhari)

Notice that the *ahadith* speak clearly of non-Muslim citizens of a Muslim state. Pakistan is an Islamic Republic; Islam is the state religion. The legal practice in Pakistan, however, speaks a very different language from that of the Qur'an and the Prophet outlined above. Pakistan has a small minority of Christians, as well as the community of the Ahmadiyya who see themselves as Muslims but have been denied Muslim status by law, and other faiths. Religious minorities suffer many disadvantages under the laws inspired by a rigorous application of the Shari'ah, especially in the Salafite tradition, of which the Wahhabism in Saudi Arabia is the most prominent version. It is gaining ground among strictly traditionalist Muslim circles. Criminal prosecution even of non-Muslims for blasphemy is a widespread phenomenon in Pakistan and very often used as an instrument for entirely different and manifestly un-Islamic purposes, for example, to get rid of a person whose land the

complainant is hoping to obtain⁸. Even if a person is acquitted of blasphemy, the mob, not infrequently with the approval or even encouragement of the local Muslim clerics⁹, will often take judgment in their own hands and murder them after release from jail, which is why many flee their home and accordingly have to give up their possessions or even family ties¹⁰. Indeed, suspects are routinely arrested for their own protection from the mob.

Their actions, seen from the point of view of conventional textual interpretation, would seem to stand on questionable jurisprudential legs: Blasphemy (*sabb*), as opposed to apostasy¹¹ (*ridda*), is not mentioned¹² as such as an offence in the Qur'an,

⁸ Michael Nazir-Ali, 'Islamic Law, Fundamental Freedoms, and Social Cohesion', in R Ahdar and N Aroney(eds), *Shari'a in the West* (OUP 2010), 78 – 80. Nazir-Ali was the First Bishop of Raiwind in the West Punjab from 1984 – 1986.

⁹ See Hasnain Kazim, Juliane von Mittelstaed, Yassin Musharbash, Daniel Steinvorth, Volkhard Windfuhr and Bernhard Zand, 'The Difficult Struggle of Christians in the Orient', Spiegel Online International, 13 January 2011, reporting on the murder of the liberal Governor Salman Taseer who had supported a Christian woman accused of blasphemy:

The fact that his killer, Malik Mumtaz Qadri, a fanatic known to the police, managed to secure a position on Taseer's security detail shows just how isolated Pakistan's secular elite has become - and just how dangerous Jihadism has become. After the murder, when Qadri was brought before a judge for a preliminary hearing, lawyers showered him with rose petals and offered to defend him free of charge. An association of 500 religious scholars - including many who had previously been regarded as moderate - praised the killer and warned others from attending Taseer's burial, saying: "Whoever supports an evildoer is an evildoer himself. What Qadri has done makes every Muslim proud."

Online at <www.spiegel.de/international/world/0,1518,738971-2,00.html> accessed 28 May 2012. See also the May 2009 report by the United States Commission on International Religious Freedom on Pakistan, online at <www.uscirf.gov/images/AR2009/pakistan.pdf> accessed 28 May 2012, which contains the following quote, at 65:

Dramatic political events unfolded in Pakistan in the past year, some of them with a potentially significant impact on the rule of law and human rights protections generally, including freedom of religion or belief. This year also has seen the largely unchecked growth in the power and reach of religiously-motivated extremist groups whose members are engaged in violence in Pakistan and abroad, with Pakistani authorities ceding effective control to armed insurgents espousing a radical Islamist ideology. In addition, all of the serious religious freedom concerns on which the Commission has reported in the past persist. Sectarian and religiously-motivated violence continues, particularly against Shi'a Muslims, Ahmadis, Christians, and Hindus, and the government's response continues to be insufficient, and in some cases, is outright complicit. A number of the country's laws, including those restricting the rights of Ahmadis and criminalizing blasphemy, frequently result in imprisonment on account of religion or belief and/or vigilante violence against the accused.

¹⁰ *ibid.* (fn. 8).

¹¹ Incidentally, what can be said for *sabb* also applies to *ridda*: The Qur'an reserves punishment to God for the apostate in the life to come, Sura 16:106; it does not mention leave alone order any punishment in this life. This did not prevent the *ulama* of all schools from deducing from other less

neither as a *hadd* nor as a *qisas* crime; it is thus by definition purely *ta'zir*, i.e. something which is for the discretion of the worldly ruler or caliph to penalise or not.¹³ However, it is obvious that the Islamic jurists, the *ulama*, had and have a great influence on the caliph of the day, based on their coveted reputation as interpreters of the divine Shari'ah, conveniently glossing over the fact that the vast majority of the Shari'ah is man-made through jurisprudence. The verse that was sometimes used by the *ulama* as a basis for such an offence, Sura 33:57, clearly speaks of rejection *by God* in this life and the next, not of an order to Muhammad to punish, unless it is a case of open rebellion by force¹⁴. This interpretation would seem to be borne out by a number of other Qur'anic verses that counsel restraint to Muhammad and the Muslims in reacting to people who do not believe the message of Islam and express different views¹⁵. Similarly, the tradition of the Prophet himself is inconclusive: Some people who insulted him were punished by death, some were pardoned by him¹⁶. The judgment of the Federal Shariat Court (FSC) of Pakistan in *Qureshi v Pakistan*¹⁷ cannot belie that: It is quite strained in its argument based on the Qur'anic *ayas* none of which deal with blasphemy as such, and mainly relates to *ahadith* of the Prophet either ordering or condoning the killing of people who had insulted him within or outside his presence. It seems toward the end of the judgment that the judges of the FSC tried to cast blasphemy as a sub-category of apostasy in order to move it into the *hadd* category; yet even then the argument would still run afoul of the fact that many scholars do not regard *ridda* as a proper *hadd* offence because its punishment is not fixed in the Qur'an.

explicit verses, such as 2:217 and 4:88 – 89, that a punishment was permitted or even required. However, from the direct textual context of these verses it is not clear at all that a worldly punishment is allowed or warranted. See Michael Nazir-Ali, *ibid.* (fn. 8) 77 – 78.

¹² Some Muslim scholars, such as the Pakistani Javed Ahmad Ghamidi, doubt that it has a basis in Islam at all; see Declan Walsh, 'Islamic scholar attacks Pakistan's blasphemy laws', *The Guardian*, 20 January 2011, online at <www.guardian.co.uk/world/2011/jan/20/islam-ghamidi-pakistan-blasphemy-laws> accessed 28 May 2012.

¹³ See for the distinction between the different categories, for example, Mathias Rohe, *Das islamische Recht: Geschichte und Gegenwart* ['Islamic law: Past and Present'] (2nd edn, CH Beck Verlag, 2009) 122 ff.; Rudolph Peters, *Crime and Punishment in Islamic Law* (CUP 2005) 6 ff.

¹⁴ Sura 5:33.

¹⁵ Suras 4:140; 7:199; 9:74; 16:128; 20:130; 25:63; 28:55; 73:10; 45:14; 50:39.

¹⁶ *ibid.* fn. 8.

¹⁷ All Pakistan Legal Decisions [1991] 43 10 ff.

The following may serve as a clarification of the core issue involved here: It was and is clearly not an offence punishable by death under Shari’ah to insult an ordinary person; thus the death penalty for insulting the Prophet under traditional interpretation *must* have had to do with the *status* of the Prophet as the Messenger of God. In other words, people were required to believe that he was God’s messenger and his message the final revelation and that thus Islam was the correct and only true religion, or they faced death if he or his believers found out they did not and said so. *Ergo* as a matter of deductive logic, at the very least insofar as the people punished were not Muslims, it could be argued that the traditional interpretation of these *ahadith* leads to the result that the Prophet forced his religion on them, although the Qur’an is explicit about the fact that he had no power to do so. The traditional view thus creates a conceptual rift between the Qur’an and the *Sunna*.

From a purely doctrinal point of view this raises the inevitable question of whether the *Sunna* ranks equal to or below the Qur’an, and whether the Prophet could somehow abrogate verses of the latter. Jonathan A. C. Brown in his magisterial work on *hadith* has the following to say:

As the lens through which the Quran was understood, the Sunna of the Prophet has controlled the way in which Muslims have interpreted the Quranic revelation. Although no Muslim would claim that the word of Muhammad is *ontologically* equal or superior to the word of God, early Sunnis such as Yahya bin Abi Kathir (d. 129/747) long ago acknowledged that ‘The Sunna came to rule over the Quran, it is not the Quran that rules over the Sunna.’ This was not in any way an admission of any deficiency in the Quran – rather it recognizes that the book required the Prophet’s example and teachings in order to explain its verses and unlock its manifold meanings to an evolving community. As many early Muslims such as Ayyub al-Sakhtiyani (d. 131/748) noted, ‘The Quran needs the Sunna more than the Sunna needs the Quran’. Muslim schools of thought at various times have insisted, out of principle, that the words of a mere mortal, even Muhammad, could never conceivably carry more interpretive weight than the word of God. Yet they have all historically recognized that, whichever way one chooses to phrase it, the Prophet’s

legacy has profoundly informed and altered the way the Quran's legal message has been understood¹⁸.

This argument, if it is an argument at all and not merely a historical description of a state of affairs, is easy enough to subscribe to as long as we are dealing with verses that are vague or unclear, and any serious Muslim scholar will be the first to admit that there are quite a number of those in the Qur'an. Similar issues exist in all text-based religions. Yet, Muhammad himself stated the following in a well-known *hadith* when appointing a judge to Yemen:

According to what shalt thou judge? He replied: According to the Book of Allah. And if thou findest nought therein? According to the *Sunnah* of the Prophet of Allah. And if thou findest nought therein? Then I will exert myself to form my own judgement. [The Prophet replied] Praise be to God Who had guided the messenger of His Prophet to that which pleases His Prophet.

This would at first blush give the impression that there is a clear hierarchy of application between the Qur'an and the *Sunna*. However, there is apparent agreement among early Sunni scholars, especially of the Shafi'i school, with the notable exception of the Mu'tazilites, that a *hadith* may even *break with the evident meaning* of Qur'anic verses¹⁹, although the Hanafi school is much more reluctant on when a *hadith* may replace or restrict a verse of the Qur'an²⁰. We shall also leave aside for the moment the problem of authenticity of the *ahadith* and the generally accepted fact that there exist forgeries as much to the content (*matn*) as to the pedigree or chain of transmission (*isnad*) of a number of *ahadith*²¹.

What would appear to be clear on any reading of the above, however, is that it would be very difficult to argue that the Prophet should be able to reverse the explicit instructions of God in the Qur'an as to his *own role and function* in spreading Islam as a religion, which was to *exhort but not to enforce*. There is nothing vague and unclear

¹⁸ Jonathan Brown, *Hadith – Muhammad's Legacy in the Medieval and Modern World* (Oneworld, 2009) 150 – 151. Emphasis in the original.

¹⁹ Brown (n 18) 153.

²⁰ *ibid.*

²¹ See Brown (n 18) 197 ff on the different schools of *hadith* criticism.

about that. Killing people who mock and insult him or having them killed does not sit easily with that conclusion. One could maybe use historical-critical interpretation²² to say that in the early time of the Islamic movement there was a need for decisive reaction to open challenges to Muhammad’s authority which required swift and drastic punishment. Even if that had been the case then, and the Qur’an, to repeat it, is not really an effective support for that contention, it no longer is the case now. The offence of blasphemy in its present quasi-*hadd* form thus appears to be a creature begotten by Islamic jurists in the course of their textually bound exercise of jurisprudential reasoning with regard to certain *ahadith* under *usul al-fiqh*²³. It is based on an interpretation of the Prophet’s practice which unnecessarily puts Muhammad in a bad light and, as we have seen, ultimately could lay him open to a charge of overstepping his mandate, an allegation which runs counter to one of the main themes again and again stressed by himself: That he was merely human, a messenger and not more. A more forgiving and compassionate interpretation of the source material would have easily been possible, given the general attitude displayed in the Qur’an. It would seem based on the texts mentioned above that both the Qur’an and the *Sunna* otherwise counsel extreme restraint and leave the judgment of such acts to God who has perfect wisdom – the harsh practice of extending the ambit of blasphemy by interpretation and pursuing even the most minute acts does not reflect God’s merciful nature which the Qur’an so often emphasises. This is not changed by the fact that Pakistan’s courts have displayed a tendency to restrict sharp practices and

²² However, one should be aware that the application of the historical-critical method as understood, for example, by Christian theologians to the Qur’an and the Sunna bears in itself the risk of a charge of blasphemy: It is readily apparent that any view based on a historical-critical approach to the Qur’an as understood in the secular tradition is in tension with the traditional Islamic interpretation that the Qur’an is the verbatim word of God, in a much stricter sense than this phrase was ever used in Christian theology. One needs to remember that as far as the significance for the revelation-based foundation of the religion is concerned, the Christian equivalent, for example, to the Qur’an is not the New Testament, it is Jesus Christ himself. Historical-critical theory puts the origin of the Qur’an in a historical context and allows for a potential influence by the recipient of the revelations, Mohammed, or even of the Companions, and of historical circumstances extraneous to the revelation narrative on its content, something which is again the equivalent to blasphemy in Islam. – See on this whole field the edited collections by Gabriel Said Reynolds(ed.), *The Qur’an in its Historical Context* (Routledge, 2009) and Gabriel Said Reynolds(ed.), *New Perspectives on the Qur’an: The Qur’an in Its Historical Context*2 (Routledge 2011), as well as on a textual understanding of the Qur’an, Nasr Hamid Abu Said, *Gottes Menschenwort – Für ein humanistisches Verständnis des Koran* (Herder 2008).

²³ *ibid* (fn. 8).

that so far no-one has been – judicially – executed for blasphemy²⁴. In fact, it supports the conclusion drawn above because one can see it as an expression of unease among those who have to apply and enforce the Shari'ah rather than merely make speeches about it, with the unrelenting, literalist, blinkered and in the final analysis inhuman attitude of the radicals.

While all of the above may be more debatable when the person concerned is a Muslim, punishing non-Muslims for blasphemy if they defame or criticise God, Islam, Muhammad or even religion in general, is forcing them to obey certain tenets of Islam, and would thus appear to be violating the non-compulsion rule²⁵. This is obvious, for example, if a Christian maintains that he believes in the Holy Trinity and that Jesus Christ is the Son of God, the final revelation by God to mankind – all of these are serious heresies under Islam²⁶. Muslims, if they know of it at all, tend to forget that the Christian faith, at least in its traditional and evangelical forms, requires active testimony and efforts to convert (the so-called Great Commission²⁷) and knows of one unforgivable sin similar to apostasy or blasphemy, the sin against the Holy Spirit²⁸, the actual substance of which is, however, unclear and remains controversial among theologians.

Be that as it may, this paper is ultimately not going to argue Shari'ah and New Testament interpretations; that would be a futile exercise as Nathan the Wise would agree, and would not aid in the legal evaluation of the matter at hand. What it is going to argue is that Pakistan's blasphemy laws and their implementation in practice would

²⁴ Martin Lau, *The Role of Islam on the Legal System of Pakistan* (Martinus Nijhoff 2006) 194.

²⁵ See for the Ahmadis, *ibid* (n 24) Lau who correctly states that Ahmadis by default violate the blasphemy provisions by merely adhering to their faith.

²⁶ See for the theological discussion of Jesus Christ in Islam and the polemic directed at Christians Oddbjørn Leirvik, *Images of Jesus Christ in Islam* (Continuum 2010).

²⁷ Matthew 28:16 – 20: 'Then the eleven disciples went away into Galilee, into a mountain where Jesus had appointed them. And when they saw him, they worshiped him: but some doubted. And Jesus came and spoke unto them, saying, All power is given unto me in heaven and in earth. Go ye therefore, and teach all nations, baptizing them in the name of the Father, and of the Son, and of the Holy Ghost: Teaching them to observe all things whatsoever I have commanded you: and, lo, I am with you always, even unto the end of the world. Amen'.

²⁸ Matthew 12:22 – 23: 'Every sin and blasphemy will be forgiven men, but the blasphemy against the Holy Spirit will not be forgiven. And whoever says a word against the Son of Man will be forgiven; but whoever speaks against the Holy Spirit will not be forgiven, either in this age or in the age to come'.

appear to violate Pakistan’s obligations under the R2P principle and may be seen to amount to the crimes against humanity of persecution, murder and other inhumane acts, especially if the victim is not a Muslim. Shari’ah law on blasphemy as interpreted by the reactionist *ulama* in Pakistan is incompatible with international human rights.²⁹ Liability of officials may arise for positive state-sponsored persecution based on the blasphemy laws and their enforcement, and by omission for not preventing to the best of their abilities the pervasive lynch mob justice. However, since Pakistan is not a State Party to the ICC Statute, the only way – absent an unlikely acceptance of jurisdiction ad hoc by Pakistan – of prosecuting those responsible for enforcing blasphemy laws would be by United Nations Security Council referral, an admittedly unlikely scenario given the vitriolic and livid reaction it would undoubtedly cause from Islamic states and more to the point Islamist groups, as well as logistical factors and prospects of enforcement *in situ*. Yet, that does not absolve us of the task of pointing out that the contemporary Pakistani Muslim community, based on its traditional interpretation outlined above, must ask itself the question of whether God or the Prophet really intended them to subscribe to practices that the rest of the world could these days come to consider to be a serious international crime, especially when the alleged religious foundation for doing so is so tenuous.

3. Pakistan’s blasphemy laws and practice³⁰

The use or the mere threat of a complaint for blasphemy is a powerful weapon in Pakistani society. Even those among the *ulama* who are willing to defend a person

²⁹ It does not help in that respect that Pakistan on behalf of the OIC has over the course of 12 years repeatedly introduced resolutions in the UN Human Rights Commission/Council that were ostensibly aimed at suppressing defamation of religion in general, yet against the background of Pakistani and OIC politics, were clearly meant to protect Islamic (fundamentalist) views from criticism and to implant the Shari’ah-compliant attitude to freedom of expression in the UN context. Initial support for this stance has waned over the years and in 2011 the latest resolution moved the protection away from the religion itself to the individual believer, after negotiations between the OIC and the US. See Robert Evans, ‘Islamic bloc drops U.N. drive on defaming religion’, Reuters, 25 March 2011, online at <<http://in.reuters.com/article/2011/03/24/idINIndia-55861720110324>> accessed 28 May 2012.

³⁰ See for an incisive overview of the Islamisation process in Pakistan and the consequences for religious minorities Javid Rehman, ‘Minority Rights and the Constitutional Dilemmas of Pakistan’ (2001) 19 *Netherlands Quarterly of Human Rights* 4, 417.

spuriously charged with blasphemy on the very basis of Islamic jurisprudential argument, are warned in no uncertain terms that 'protecting a blasphemer is as bad as blaspheming itself'³¹. The real-life environment for such scenarios, to be sure, is not one that disregards legal commands, but one that enforces the existing legal attitude. We already said that Pakistan is an Islamic Republic; Article 2 of the Constitution makes Islam the state religion. Article 31 requires the government to foster the Islamic way of life. What this means in practice with regard to blasphemy is set out in sections 295 ff of the Pakistani Penal Code on offences relating to religion³².

³¹ Barry Bearak, 'Death to Blasphemers: Islam's Grip on Pakistan', The New York Times, 12 May, 2001, online at <www.hvk.org/articles/0501/102.html> accessed 28 May 2012.

³² 295-A. Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs. Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of the citizens of Pakistan, by words, either spoken or written, or by visible representations insults the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

295-B. Defiling, etc., of Holy Qur'an

Whoever wilfully defiles, damages or desecrates a copy of the Holy Qur'an or of an extract therefrom or uses it in any derogatory manner or for any unlawful purpose shall be punishable with imprisonment for life.

295-C. Use of derogatory remarks, etc., in respect of the Holy Prophet

Whoever by words, either spoken or written, or by visible representation or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine.

298.

Uttering words, etc., with deliberate intent to wound religious feelings

Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year or with fine, or with both.

298-A.

Use of derogatory remarks, etc., in respect of holy personages

Whoever by words, either spoken or written, or by visible representation, or by any imputation, innuendo or insinuation, directly or indirectly, defiles the sacred name of any wife (Ummul Mumineen), or members of the family (Ahle-bait), of the Holy Prophet (peace be upon him), or any of the righteous Caliphs (Khulafa-e-Rashideen) or companions (Sahaaba) of the Holy Prophet (peace be upon him) shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

298-B.

Misuse of epithets, descriptions and titles, etc., reserved for certain holy personages or places

(1) Any person of the Qadiani group or the Lahori group (who call themselves 'Ahmadis' or by any other name who by words, either spoken or written, or by visible representation-

This law has been influenced by its interpretation through the Federal Shariat Court (FSC) under Article 203D³³ of the constitution; in 1990 the FSC held that section 295-

(a) refers to or addresses, any person, other than a Caliph or companion of the Holy Prophet Muhammad (peace be upon him), as "Ameer-ul-Mumineen", "Khalifatul- Mumineen", Khalifa-tul-Muslimeen", "Sahaabi" or "Razi Allah Anho";

(b) refers to, or addresses, any person, other than a wife of the Holy Prophet Muhammad (peace be upon him), as "Ummul-Mumineen";

(c) refers to, or addresses, any person, other than a member of the family "Ahle-bait" of the Holy Prophet Muhammad (peace be upon him), as "Ahle-bait"; or

(d) refers to, or names, or calls, his place of worship a "Masjid";

shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

(2) Any person of the Qadiani group or Lahori group (who call themselves "Ahmadis" or by any other name) who by words, either spoken or written, or by visible representation refers to the mode or form of call to prayers followed by his faith as "Azan", or recites Azan as used by the Muslims, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

298-C.

Person of Qadiani group, etc., calling himself a Muslim or preaching or propagating his faith

Any person of the Qadiani group or the Lahori group (who call themselves 'Ahmadis' or by any other name), who directly or indirectly, poses himself as a Muslim, or calls, or refers to, his faith as Islam, or preaches or propagates his faith, or invites others to accept his faith, by words, either spoken or written, or by visible representations, or in any manner whatsoever outrages the religious feelings of Muslims shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

³³ Article 203D on the powers, jurisdiction and functions of the Court. (1) The Court may, [either of its own motion or] on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government, examine and decide the question whether or not any law or provision of law is repugnant to the Injunctions of Islam, as laid down in the Holy Quran and Sunnah of the Holy Prophet, hereinafter referred to as the Injunctions of Islam.

[(1A) Where the Court takes up the examination of any law or provision of law under clause (1) and such law or provision of law appears to it to be repugnant to the Injunctions of Islam, the Court shall cause to be given to the Federal Government in the case of a law with respect to a matter in the Federal Legislative List, or to the Provincial Government in the case of a law with respect to a matter not enumerated [the Federal Legislative List], a notice specifying the particular provisions that appear to it to be so repugnant, and afford to such Government adequate opportunity to have its point of view placed before the Court.]

(2) If the Court decides that any law or provision of law is repugnant to the Injunctions of Islam, it shall set out in its decision—

(a) the reasons for its holding that opinion; and

(b) the extent to which such law or provision is so repugnant;

specify the day on which the decision shall take effect [:]

Provided that no such decision shall be deemed to take effect before the expiration of the period within which an appeal therefrom may be preferred to the Supreme Court or, where an appeal has been so preferred, before the disposal of such appeal.]

(3) If any law or provision of law is held by the Court to be repugnant to the Injunctions of Islam,—

C with the alternative penalty of life imprisonment was un-Islamic and that the only proper punishment for blasphemy was death. An appeal was filed but apparently not actively pursued in the Supreme Court, because the appellant had died, so that in 2009, after 18 years, the appeal was finally dismissed and the FSC judgment became final³⁴. Section 295-C now, despite retaining its pre-1991 wording, *de facto* only contains the mandatory punishment of death; section 295-B on defiling the Qur'an, however, does not. This is somewhat counterintuitive: The human messenger's person receives a stronger protection against defamation than his message, the very word of God itself, despite the fact that the FSC in *Qureshi* seems to see the two as intricately interlinked³⁵.

Attacks on religious minorities and moderate Muslims, such as Christian Minister Shahbaz Bhatti and Muslim Governor Salman Taseer, who try to protect the constitutional minority rights are commonplace in Pakistan. Many websites of support organisations exist which monitor the events and list especially egregious cases, such as that of Asia Bibi. The European Parliament on 18 June 1998 passed a resolution condemning the use of blasphemy laws in Pakistan³⁶. It may be apposite to refer to an excerpt of the list from the 2009 report on international religious freedom by the US State Department³⁷ to show the quality and extent of the problem which would appear to suggest an atmosphere of constant spying by Muslim radicals on non-Muslims and/or moderate Muslims, and contributory inaction by the official authorities³⁸. It

(a) the President in the case of a law with respect to a matter in the Federal Legislative List or the Concurrent Legislative List, or the Governor in the case of a law with respect to a matter not enumerated in either of those Lists, shall take steps to amend the law so as to bring such law or provision into conformity with the Injunctions of Islam; and

(b) such law or provision shall, to the extent to which it is held to be so repugnant, cease to have effect on the day on which the decision of the Court takes effect.

³⁴ See 'Pak SC rejects petition-challenging death as the only punishment for blasphemy', Pakistan News Net, 22 April 2009, online at <<http://www.pakistannews.net/story/492878>> accessed 28 May 2012.

³⁵ *ibid.* fn 17.

³⁶ Resolution on the Blasphemy Laws in Pakistan - Official Journal C 210, 06/07/1998, 211.

³⁷ See <www.state.gov/g/drl/rls/irf/2009/127370.htm> accessed 28 May 2012.

³⁸ Only events from 2009 are listed here, the list is not complete for that year: Police reportedly tortured and mistreated those in custody and at times engaged in extrajudicial killings. It was usually impossible to ascertain whether adherence to particular religious beliefs was a factor in cases in which religious minorities were victims; however, both Christian and Ahmadiyya communities claimed their members were more likely to be abused. Non-Muslim prisoners generally were accorded poorer facilities than Muslim inmates, including lack of access

seems that sections of the Pakistani Muslim society are more concerned with exposing even the slightest suspicion of blasphemy, than with the really important affairs of the country. The picture which emerges is that the general religious hype fostered among the masses of ordinary people by fundamentalist imams and other leading public figures as well as the restrictive blasphemy laws enacted by the state and applied by the courts have created an atmosphere of fear and terror for anyone who does not toe

to spiritual resources. Conversion to other minority religious groups generally took place in secret to avoid societal backlash.

- On June 30, 2009, a fistfight erupted into an alleged incident of blasphemy that sparked a mob attack on a Christian community in the district of Kasur, Punjab, prompting 700 persons to flee their homes. Federal Minister for Minorities Affairs Shahbaz Bhatti offered compensation to the affected families. Several NGOs remained concerned about the incident.

- On June 23, 2009, Compass Direct News reported that police imprisoned Arshad Masih, a Christian man from Gujranwala, in Sialkot jail and abused him in custody. Reportedly, police abused Masih because his father was a Christian preacher. Although he was officially charged with robbery, he was later granted bail on the strength of testimony that he was not among the robbers. Due to the physical abuse he suffered in custody, he was sent to the Allama Iqbal Memorial Hospital. According to Compass Direct News, authorities allegedly ordered him to be silent about the abuse.

- On May 28, 2009, Mian Laiq Ahmad, an Ahmadi trader in Faisalabad, died after unknown assailants brutally attacked him. According to Jamaat-e-Ahmadiyya, he was the fifth Ahmadi killed in 2009 and the 101st killed since anti-Ahmadi laws were introduced in 1984.

- In May 2009 two students of a seminary in Chakwal, Punjab, entered the home of an Ahmadi, Mubashir Ahmed, and tried to behead him. Neighbors intervened and saved his life, but he was severely injured. One student was caught and brought to a local police station and the other escaped. Police booked a case and were trying to find the other assailant.

- On April 17, 2009, authorities released from prison Catholics James Masih and Buta Masih, who were convicted of blasphemy and sentenced to 10 years in prison in November 2006 for allegedly burning a Qur'an.

- On March 4, 2009, 15 Ahmadis were charged under Section 298c of the Penal Code for calling their place of worship a mosque and for offering Eid prayers there. They were also charged with posing as Muslims. According to reports, the arrests were the result of a business dispute.

- A 17-year-old student, Naveed Aziz, and Pastor Shafiq Masih were accused of blasphemy in January 2009 when a fellow student noticed "blasphemous material" in Aziz's bag.

- In January 2009 police arrested four Ahmadi teenagers and an adult in Layyah, Punjab, on charges of blasphemy. Because there was no supporting evidence, the accused were not indicted; however, they remain incarcerated more than five months after their arrest. Some local clerics reportedly attempted to incite communal tensions following the incident. Allegedly, a local Member of the National Assembly from the Pakistan Muslim League-Nawaz party, *Saqlain Shah*, provided political support for the agitation. At the federal level, the Ministry of Minorities Affairs tried to win the release of the teenagers but had not succeeded by the end of the reporting period.

- In January 2009 police arrested Hector Aleem in Rawalpindi on charges of sending a blasphemous text message from his cell phone. After a hearing by an antiterrorism court, Aleem, who is a member of an agency that works for Christians' rights, was cleared of the blasphemy charges but not of abetting a crime. A government official told Compass Direct News the decision was heavily influenced by religious extremists telling the judge, "If you release him (Aleem), then we will kill him outside."

the majority line. Consequences range from mere verbal harassment to extrajudicial killings by private citizens condoned by the authorities, or even positive acts by the latter themselves³⁹. We shall now look at the legal qualification of this situation under international criminal law in the context of the newly coined principle of R2P.

4. Pakistan and R2P

Following the 2005 UN World Summit and the 2009 Report by the Secretary-General as well as the debate in the General Assembly culminating in Resolution 63/308 on R2P, the member states recalled two crucial passages from the 2005 Summit outcome document:

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.⁴⁰

³⁹ See on this the account by Sadakat Kadri, *Heaven on Earth A Journey through Shari'a Law*, (The Bodley Head, 2011) 218 ff.

⁴⁰ A/60/L.1 of 15 September 2005.

Some states, but not Pakistan, expressed concern in the debate before the 2009 resolution about the implementation of R2P and were clearly worried about the potential for outside interference⁴¹, yet the Security Council had already referred to the two paragraphs above in Resolutions 1674(2006) on the protection of civilians in armed conflicts and 1706(2006) on the deployment of UN peacekeepers to Sudan. There was also resistance in 2008 from some member states when the budget for the new Special Adviser on R2P was to be approved in the 5th Committee. However, it would seem that despite the reluctance of a few member states on particular issues having to do with enforcement, the General Assembly was clear in the acknowledgement of the R2P principle as such⁴². No state made any kind of formal reservation. More to the point, not even the Islamic states made any reservation regarding the application and precedence of the Shari’ah. R2P is therefore a concept that is supported in principle by all member states of the UN. Pakistan thus accepts that it must protect its citizens against crimes against humanity, and that it is first and foremost the task of the domestic government to do so.

5. Crimes against humanity

Pakistan, like the majority of Muslim states, has not joined the ICC Statute as a State Party⁴³. Therefore, as we saw above, the only way of referring a situation to the ICC, unless Pakistan accepts the jurisdiction *ad hoc*, is a United Nation Security Council referral. Leaving aside the jurisdictional issue, what interests us here is the question whether the Pakistani law and practice of prosecuting and punishing blasphemy as well as the official condoning of vigilante justice could be subsumed under the concept of a crime against humanity. Given that the law of the ICC is the most modern definition of many principles of international criminal law, and that the ICC is

⁴¹ See the summary of the statements made at <http://globalr2p.org/media/pdf/GCR2P_Summary_of_Statements_on_Adoption_of_Resolution_on_R2P.pdf> accessed 28 May 2012.

⁴² See the report by the Global Centre for R2P at <http://responsibilitytoprotect.org/GCR2P_%20General%20Assembly%20Debate%20Assessment.pdf> accessed 28 May 2012.

⁴³ On the reasons for the reluctance of Islamic countries see Adel Maged, ‘Arab Perspectives on the Current System of International Criminal Justice’ (2008) 8 International Criminal Law Review, 477. This attitude may be changing in the wake of the Doha Regional Conference of May 2011.

at the moment the only existing forum before which a prosecution of Pakistani officials and possibly radical Imams can even be imagined, it seems apt to employ the ICC law for this exercise. The offences in question are persecution and murder; however, we will restrict ourselves to the former in this discussion. The relevant provisions are set out in the Statute and the Elements of Crimes, which specify and guide the interpretation of the offences listed in the Statute. The provisions in question are Articles 5, 7, 25 and 30 of the ICC Statute, as well as Article 7 of the Elements of Crimes⁴⁴.

⁴⁴ Article 7, Crimes against humanity, Introduction.

1. Since article 7 pertains to international criminal law, its provisions, consistent with article 22, must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.

2. The last two elements for each crime against humanity describe the context in which the conduct must take place. These elements clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population. However, the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.

3. 'Attack directed against a civilian population' in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that 'policy to commit such attack' requires that the State or organization actively promote or encourage such an attack against a civilian population.

Article 7 (1) (h), Crime against humanity of persecution, Elements

1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.

2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.

3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.

4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.

5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

It would appear to be a matter of mere declension of the criteria set out in those provisions to see whether and how the practice of blasphemy law in Pakistan matches those categories. Let us remind ourselves of the boxes that need to be ticked, as it were:

1. Deprivation of one or more persons of fundamental rights;
2. Contrary to international law;
3. Targeted by reason of group identity;
4. Targeting based on religious grounds;
5. Committed in context of any act under Art. 7(1) or another crime under the Statute (specific nexus requirement);
6. Committed as part of widespread or systematic attack against a civilian population, i.e. a course of conduct involving the multiple commission of acts referred to in Art. 7(1) against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack (general nexus requirement);
7. Perpetrator had knowledge of or intent to make conduct part of, that attack.

a) Ad 1. and 2.

As argued above, the blasphemy laws and their practice deprive non-Muslim minorities including the Ahmadiyya of their fundamental right to religious freedom, because at least as far as they are concerned, certain tenets of Islam are forced upon them on pain of sanctions via the criminal law and the phenomenon of insufficiently restrained mob justice. Religious freedom has been established under Art. 18 ICCPR⁴⁵.

⁴⁵ Article 18: 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

(...)

Pakistan entered the following reservation when it acceded to the ICCPR by ratification in 2010:

Upon ratification:

Article 3, 6, 7, 18 and 19

‘[The] Islamic Republic of Pakistan declares that the provisions of Articles 3, 6, 7, 18 and 19 shall be so applied to the extent that they are not repugnant to the Provisions of the Constitution of Pakistan and the Sharia laws’.

(...)

Upon signature:

The Government of the Islamic Republic of Pakistan reserves its right to attach appropriate reservations, make declarations and state its understanding in respect of various provisions of the Covenant at the time of ratification.

These reservations were later apparently partially withdrawn in September 2011, and now seem to relate only to Articles 3 and 25:

Reservations made upon ratification:

Article 3

"The Government of the Islamic Republic of Pakistan declares that the provisions of Article 3 of the International Covenant on Civil and Political Rights shall be so applied as to be in conformity with Personal Law of the citizens and Qanoon-e-Shahadat."

Article 25

"The Government of the Islamic Republic of Pakistan states that the application of Article 25 of the International Covenant on Civil and Political Rights shall be subject to the principle laid down in Article 41 (2) and Article 91 (3) of the Constitution of Pakistan."

Upon signature

Reservation:

"The Government of the Islamic Republic of Pakistan reserves its right to attach appropriate reservations, make declarations and state its understanding in respect of various provisions of the Covenant at the time of ratification."⁴⁶

The Constitution of Pakistan contains the provisions relevant to religious freedom.⁴⁷

⁴⁶ Available on line, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec accessed 28 May 2012.

⁴⁷ Article 20 Freedom to profess religion and to manage religious institutions

Subject to law, public order and morality:-

(a) every citizen shall have the right to profess, practice and propagate his religion; and

(b) every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions.

Article 22 Safeguards as to educational institutions in respect of religion, etc.

(1) No person attending any educational institution shall be required to receive religious instruction, or take part in any religious ceremony, or attend religious worship, if such instruction, ceremony or worship relates to a religion other than his own.

(2) In respect of any religious institution, there shall be no discrimination against any community in the granting of exemption or concession in relation to taxation.

(3) Subject to law:

The Constitution as such does not restrict the right to religious freedom, so Art. 18 ICCPR is not repugnant to it. Art. 20, despite its obvious link to the blasphemy issue, has not yet as such been held to be repugnant to Islam; indeed the issue was not even touched upon in *Qureshi v Pakistan*. Freedom of religion as such is supported by the analysis of the Shari’ah regulations at the beginning of this paper, thus it would also seem difficult to find that clause repugnant to Islam. Art. 25 contains a general equality clause, and more to the point a general equal protection clause, the contents of which would not appear to be consumed by the *lex specialis* right of religious freedom and which is of relevance for a potential omissions liability. As mentioned above, the international community has consistently criticised the Pakistani practice of enforcement of the blasphemy laws. Even if it was still relevant, the initial reservation made with regard to Art. 18 ICCPR does not prevent us from concluding that the current basis and application of the blasphemy laws is depriving the non-Muslim population, especially the Christians and Ahmadis, of their religious freedom.

b) Ad 3 And 4.

Because the prosecution for blasphemy is expressly based on religious belief and its expression in public, this issue would appear to be straightforward. At least as far as non-Muslim communities are concerned whose very foundations of faith may contradict Islam to a degree of heresy as does, for example, Christianity, the targeting is based on religious group identity. Even in the case of the Ahmadiyya who see themselves as part of the Muslim *ummah*, the state itself ascribes a non-Muslim,

(a) no religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any educational institution maintained wholly by that community or denomination; and

(b) no citizen shall be denied admission to any educational institution receiving aid from public revenues on the ground only of race, religion, caste or place of birth.

(4) Nothing in this Article shall prevent any public authority from making provision for the advancement of any socially or educationally backward class of citizens.

Equality of citizens

All citizens are equal before law and are entitled to equal protection of law. [...]

Article 33 Parochial and other similar prejudices to be discouraged

The State shall discourage parochial, racial, tribal, sectarian and provincial prejudices among the citizens.

separate religious identity to them. It may be more difficult to argue this point in favour of moderate Muslims, because they are probably not a separate religious group within Islam within the meaning of the ICC Statute. However, that question may be easier to affirm if it is about the general split between Sunni and Shi'a.

c) Ad 5. and 6.

The specific as opposed to the general⁴⁸ nexus requirement, which under the ICC Statute⁴⁹ exists only for the offence of persecution, was based on the reluctance of the drafters of the ICC Statute to have persecution as an ill-defined free-standing offence that could have too wide an application if not restricted by a certain seriousness criterion raising it to a level commensurate with the other offences listed in the Statute⁵⁰. This was done by linking it to another *act* under the heading of Art. 7(1) or any other *crime* under the Statute, which can in theory, for example, be another crime against humanity but also an offence of genocide or a war crime⁵¹. Given that there is no judgment of the ICC on the issue yet, this topic must be treated with some caution. Genocide and war crimes do obviously not come into the picture in this context, so we must look at other *acts* enumerated under Art. 7(1). Listed above we have Art. 7(1)(a) for murder, (e) for imprisonment or other serious deprivations of liberty in violation of fundamental rules of international law, and (h) for other inhumane acts of a similar gravity as the enumerated offences. However, it needs to be emphasised that the other *act* does not have to be part of the widespread or systematic attack as such⁵². Ambos/Wirth have pointed out at the example of murder as another *act*:

Consequently, the persecutory conduct must only be connected to a (single) murder and not to a murder which is part of a widespread or systematic attack consisting of other enumerated inhumane acts... In other words, a multiplicity of grave human

⁴⁸ See on that William Schabas, *The International Criminal Court – A Commentary on the Rome Statute* (OUP 2010) 155.

⁴⁹ There is no such requirement under international customary law, see Art 3(g) ICTR Statute and Art 5(h) ICTY Statute; see also Schabas (n 48) 177.

⁵⁰ Darryl Robinson, 'Developments in International Criminal Law: Defining 'Crimes Against Humanity' at the Rome Conference' (1999) 93 *American Journal of International Law* 43 (54); Georg Witschel and Wiebke Rückert, 'Article 7(1)(h) – Crime Against Humanity of Persecution', in Roy S Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001) 95.

⁵¹ It is an entirely different question whether there would be a prosecution under multiple heads; see Schabas (n 48).

⁵² Somewhat ambiguous, therefore, see above Schabas (n 48).

rights violations (which are not, as such, enumerated among the inhumane acts), e.g., severe attacks on personal property, can be transformed into the crime of persecution by a single connected murder⁵³.

(a) *Murder*: No-one has been judicially executed yet after a conviction for blasphemy. Liability under persecution for commission by positive act can thus realistically only arise for Imams or other leaders who encourage or even incite lynch mob executions. The liability of government officials arises under omissions liability. While the ICC Statute, apart from the specific issue of superior responsibility under Art. 28, is silent about this and the negotiators did not include a separate omissions liability because of the resistance of France and similar legal systems who do not subscribe to omissions liability in criminal law, there appears to be consensus nonetheless based on the jurisprudence of the ad-hoc tribunals that omissions will be criminally relevant if the person was under a duty to act⁵⁴. That duty to act would appear to flow naturally from the government's overall official duty to protect the rights of its citizens under the Constitution, as well as possibly from the R2P principle as set out above and from the equal protection clause of Art. 25 of the Constitution.

(b) *Serious deprivation of physical liberty under violation of fundamental international rules of law*: Persons accused of blasphemy are very often kept in remand custody, and not infrequently for their own protection. The empirical evidence is in need of further verification, but it appears that judges do use this instrument rather regularly. An order for remand in custody typically requires considerations of the strength of the evidence put before the examining judge, the sentence to be expected in a case of conviction and the flight risk, bearing in mind that in some ways the second influences the third, and/or concerns about the suspect's tampering with evidence if left at liberty. The sentence being death the second criterion is regularly fulfilled; a flight risk may also exist, if only for the fear of being killed by the neighbours even before trial which is something that is not the suspect's fault. Given that alleged blasphemers will typically be in a weak position in society

⁵³ K Ambos and S Wirth, 'The Current Law on Crimes Against Humanity' (2002) 13 Criminal Law Forum 1, 72.

⁵⁴ Schabas (n 48) 430.

and cannot expect much support from others who do not wish to be seen as aiding a blasphemer and thus become blasphemers themselves, there is little concern about tampering with evidence, if there is any evidence at all apart from a witness stating that he heard the suspect make a blasphemous utterance. This leads to the final criterion, the strength of the evidence: Often, it will be nothing more than the aforementioned statement. The judge thus either detains the suspect on the (uncorroborated) say-so of a witness, or he detains him for his own protection. Protective custody, however, because the suspect would otherwise face lynching by the mob is not acceptable unless the suspect requests or agrees to it. Even then, it would have to be in markedly different conditions from that of the normal remand custody, something that would not seem to be the case in Pakistan. If the custody order is based on the incriminating statement, the judge will have to make a very careful evaluation of its reliability and veracity. It is difficult to believe that any educated judge in Pakistan could be under any illusion as to the reality of such accusations. Liability under this heading could attach to the Imams and other leaders under the secondary participation rules of Art. 25 ICC Statute, and for the judge, prosecutor and police etc. under the direct perpetrator rules, depending on the circumstances. There is thus a high likelihood that this element would also be made out.

(c) *Other inhumane acts*: This residual category is meant to catch all acts not explicitly enumerated which are of the same seriousness as those that are. Attacks on property have been put forward as falling in this category, as may be the destruction of the life and livelihood of the suspect in the community and possibly in their own extended family. Certainly the need to leave the area or even the country for fear of reprisals comes close to the seriousness of forcible transfer.

In sum it would appear that we could find the required other *acts* on which to pin a persecution charge.

The element of a *civilian population* is unproblematic. An *attack* is defined by the Elements of crimes under Art. 7(1) no. 3 above as ‘a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute ... pursuant to or in furtherance of a *State or organizational policy* to commit such attack. The acts need not constitute a military attack’. The policy element is defined in the same Element as follows: ‘It is understood that ‘policy to commit such attack’

requires that the State or organization actively promote or encourage such an attack against a civilian population.’ As Javaid Rehman, an expert on the legal system of Pakistan, has concluded⁵⁵, the Islamic laws have been ‘set in place to target and victimise certain groups’; he is supported in that analysis by Rudolph Peters⁵⁶. The current law developed in the era following the death of the moderate state founder, Jinnah, in 1948, when the struggle between the moderates and reactionaries broke out openly, with the former having clearly ceded the battlefield by now. Accordingly, one could *prima facie* assume that the Islamised version of the Constitution and the Islamised Penal Code including the *Hudud* Ordinances⁵⁷ as well as the pre-emptive and *proprio motu* jurisdiction of the FSC to ensure strict adherence to Shari’ah principles are evidence of a state policy of Islamisation of the country and the ultimate suppression of non-Muslim ways of life, notwithstanding the freedom of religion clauses in the constitution which seem mostly devoid of substance in practice, at the very least in the context of the blasphemy issue. The application of the law and the failure to repress mob justice⁵⁸ may thus be considered a direct emanation of that state policy, and the acts of the mob could be seen as being committed in its furtherance. There is no need to debate the merits of the recent ICC development on the interpretation of the concept of ‘organisation’ after the *Kenya Decision* by Pre-Trial Chamber II of 31 March 2010⁵⁹ which controversially extended the concept beyond its traditional meaning⁶⁰.

⁵⁵ Rehman (n 30) 443.

⁵⁶ Peters (n 13) 180. See also Martin Lau, ‘Sharia and national law in Pakistan’ in Jan Michiel Otto (ed.), *Sharia Incorporated – A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Amsterdam and Leiden University Press, 2010), 422.

⁵⁷ On those see Tahir Wasti, *The Application of Criminal Law in Pakistan – Sharia in Practice* (Brill, 2009).

⁵⁸ This may be one of the exceptional cases mentioned by footnote 6 to the Elements of Crimes: ‘A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action’.

⁵⁹ Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Case No. ICC-01/09, of 31 March 2010.

⁶⁰ See for a critique Claus Kress, ‘On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement’ (2011) 24 *Leiden Journal of International Law*, 855.

An attack is *widespread* if it happens on a larger geographical scale or against a large number of people in a smaller locality, and *systematic* if it is executed in an organised, deliberate and planned fashion or as part of a non-accidental repetitive pattern etc.⁶¹. Both elements are fulfilled as far as the activity or inaction of state officials are concerned, for the Imams and the mob one will at the very least be able to say that the former element is met.

d) Ad 7.

It is neither necessary that the offender share the legal interpretation of the conduct, nor need he know all the specifics: Art. 7 No. 2 of the Elements of Crimes provides: ‘However, the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization.’ There can be little doubt that in the case of state officials there is direct knowledge if not intent, and in the case of the mob and its Imams circumstantial knowledge will be relatively straightforward to establish, unless one wishes to accept direct knowledge based on modern telecommunications.

This leaves us with the overall corrective criterion of Art. 1 ICC Statute, that the ICC shall have jurisdiction over the persons responsible for the ‘most serious crimes of international concern’ and apply the complementarity principle. However, compared to the mention of crimes against humanity in Art. 5 No. 1 ICC Statute, and the general nature based on widespread or systematic occurrence, it is difficult to see why the ICC’s material jurisdiction should not be triggered. Pakistan would in all likelihood not be able to mount an effective challenge under the admissibility rules of Art. 17 ICC Statute, either, because it has so far shown that it is both unable and unwilling, for identical reasons, to remedy the situation through the domestic system.

In sum, the depressing conclusion has to be that under ICC standards, the situation in Pakistan comes dangerously close to crossing the line into crimes against humanity, if it has not crossed it already. We should remind ourselves of the intrinsic doubtfulness

⁶¹ Schabas (n 48) fn 147; also on the effect of the interplay between Art. 7(1) and (2)(a) which has by some been taken to make the two criteria cumulative after all, despite the ‘or’. In practice, as Schabas rightly points out, the two will overlap in any event.

of the Islamist claim that this can be justified in the name of Islam. Quite the contrary, it should be seen as an aberrant mutation of the very idea of Islam.

6. Conclusion

Any attempt, by legislation, to control or dictate the belief of individuals, is so impracticable, so perfectly futile, as to show at once, how entirely above all civil authority are the operations of the human mind, especially in the adoption of its religious faith. ... For a man's private opinions, for his communion with his creator, for his devotional feelings and exercises, he is answerable to his God alone. When he engages in the discussion of any subject in the honest pursuit of truth, and endeavours to propagate any notions and opinions which he sincerely entertains, he is covered by the aegis of the constitution; but when he wantonly or maliciously assails the rights and privileges of others, or disturbs the public peace, he is the proper subject of punishment.

Morton J, Dissenting Opinion in *Commonwealth of Massachusetts v. Abner Kneeland*, 1838 [20 Pick. 206; 37 Mass. 206]

Unfortunately, the enlightened class has abdicated its responsibility of teaching true Islam to the central masses, leaving them in the hands of the semiliterate clerics. People from the enlightened class tutor their children in every subject under the sun, but when it comes to religion they relinquish this crucial responsibility to their neighborhood clerics. ... Today, the central masses are confused about where Islam actually stands on various issues facing the world in general and the Muslim world in particular. They need to be drawn away from the clerics' obscurantist views, and towards the enlightened, progressive, moderate message of Islam. ... Dealing with extremism requires prudence. It involves addressing religious and sectarian extremism. It is a battle of both hearts and minds. Mind-sets cannot be changed by force. They must be transformed by superior logic and action. We have to facilitate this transformation. It involves mobilizing the silent moderate majority to rise and play a positive role.

Pervez Musharraf, *In the Line of Fire – A Memoir* (Free Press, 2006) 278, 280.

Commonwealth v Kneeland was the last case in which a court in the United States imprisoned a defendant for blasphemy. The law as presently practised in Pakistan has not progressed beyond 1838; in fact, it still seems stuck in the historical phase of the emerging textual and jurisprudential traditions of the Qur'an and the *Sunna*. The oft-repeated protestations that Muslims do respect other faiths and would not harm

adherents of other religions purely because of that fact appear to be given the lie in everyday Pakistani life where reactionary and aggressive Islamism has the upper hand. If Islam is a religion of peace, then Pakistan would not seem to be a land of Islam, no matter what its constitution says. Karen Armstrong, the respected champion of Islam in the West, in her 2011 book 'A Letter to Pakistan'⁶², exhorts the members of Pakistani society 'to rediscover compassion in their daily lives as a way to overcome the cultural and religious traditions in a globalized world'⁶³. This echoes former President Musharraf's insight that the real battlefield is in the hearts and minds of the people. One can only hope that she and others succeed in planting the seed so that Muslims there can give meaning again to the opening formula heard at so many an occasion: '*Bismillah ar-rahman ar-rahim* – In the name of God, the Merciful and Compassionate!' They should remind themselves that none of the 99 exalted names of God refers to hatred and violence, but that many of them call him forgiving.

⁶² See <<http://www.oup.com.pk/shopexd.asp?id=2018>> accessed 28 May 2012.

⁶³ *ibid.*